

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

77-1133

To be argued by
MICHAEL HARTMERE

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 77-1133

UNITED STATES OF AMERICA,

Appellee,

—v.—

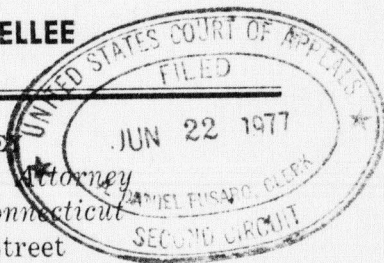
LOUIS DIMAIO,

Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

BRIEF FOR THE APPELLEE

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**United States Court of Appeals
FOR THE SECOND CIRCUIT**

Docket No. 77-1133

UNITED STATES OF AMERICA,

Appellee,

—v.—

LOUIS DIMAIO,

Appellant.

BRIEF FOR THE APPELLEE

Statement of the Case

On July 14, 1976 a Federal Grand Jury sitting at New Haven, Connecticut, returned a true bill of indictment (N-76-95) charging the defendant Louis Dimaio in two counts. Count One charged that the defendant knowingly and willfully aided and assisted in the preparation and presentation to the Internal Revenue Service of a false and fraudulent U.S. Information Return (Form 1099), in violation of Title 26, United States Code, Section 7206(2), and Title 18, United States Code, Sections 2(a) and 2(b). Count Two charged a conspiracy to defraud the United States by impeding, impairing and obstructing the lawful governmental function of the collection of the revenue, in violation of Title 18, United States Code, Section 371. Prior to trial, co-defendant John Doe, also known as Edward S. Smith, also known as Donald M. Collins, pled guilty and was sentenced.

On July 22, 1976 the defendant entered a plea of not guilty to each count of the indictment.

On September 27, 1976 a jury was selected, but not sworn, and the case was set down for jury trial on October 12, 1976. The case did not begin on October 12, 1976 due to the defendant's motion for a continuance.

Trial by jury commenced on January 17, 1977 in United States District Court, New Haven, before the Honorable Jon O. Newman, United States District Judge. The jury trial concluded on January 19, 1977 and, after approximately one hour of deliberation, the jury returned a verdict of guilty as to each count.

On February 22, 1977 the defendant was sentenced to the custody of the Attorney General for two years on Counts One and Two, to be suspended after six months of incarceration, and to be followed by a probation period of three years. The sentences on the two counts were to run concurrently and the Court recommended incarceration in the State of Rhode Island.

The same \$10,000 non-surety bond was continued pending this appeal, and a timely Notice of Appeal was filed.

Statutes Involved

Title 26, United States Code,

Section 6041. Information at source

"(a) Payments of \$600 or more.—All persons engaged in a trade or business and making payment in the course of such trade or business to another person, of rent, salaries, wages, premiums, annuities, compensations, remunerations, emoluments, or other fixed or determinable gains, profits,

and income (other than payments to which section 6042(a)(1), 6044(a)(1), or 6049(a)(1) applies, and other than payments with respect to which a statement is required under the authority of section 6042(a)(2), 6044(a)(2), 6045, 6049(a)(2), or 6049(a)(3), of \$600 or more in any taxable year, or, in the case of such payments made by the United States, the officers or employees of the United States having information as to such payments and required to make returns in regard thereto by the regulations hereinafter provided for, shall render a true and accurate return to the Secretary or his delegate, under such regulations and in such form and manner and to such extent as may be prescribed by the Secretary or his delegate, setting forth the amount of such gains, profits, and income, and the name and address of the recipient of such payment."

* * * * *

"(d) Recipient to furnish name and address.—When necessary to make effective the provisions of this section, the name and address of the recipient of income shall be furnished upon demand of the person paying the income. Aug. 16, 1954, c. 736, 68A Stat. 745; Oct. 16, 1962, Pub.L. 87-834, § 19(f), 76 Stat. 1058."

Section 7206. Fraud and false statements

"Any person who—

* * * * *

(2) Aid or assistance.—Willfully aids or assists in, or procures, counsels, or advises the preparation or presentation under, or in connection with any matter arising under, the internal revenue laws, of a return, affidavit, claim, or other document, which is fraudulent or is false as to any material matter, whether or not such falsity or

fraud is with the knowledge or consent of the person authorized or required to present such return, affidavit, claim, or document; . . . shall be guilty of a felony and, upon conviction thereof, shall be fined not more than \$5,000, or imprisoned not more than 3 years, or both, together with the costs of prosecution. Aug. 16, 1954, c. 736, 68A Stat. 852."

Title 18, United States Code,

Section 2. Principals

"(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

"(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal. As amended Oct. 31, 1951, c. 655, § 17b, 65 Stat. 717."

Section 371. Conspiracy to commit offense or to defraud United States

"If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than \$10,000 or imprisoned not more than five years, or both.

"If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor."

Questions Presented

I. Did the Government present evidence from which a reasonable mind might fairly conclude guilt beyond a reasonable doubt?

II. Did the Government violate the principle of law which has emerged from *Brady* and its progeny?

III. Was evidence of prior and subsequent similar acts properly admitted into evidence?

IV. Did the trial court properly instruct the jury as to the law to be applied in this case?

Statement of Facts

On the evening of April 5, 1976 Dennis Kubesh, a resident of Westchester, Connecticut, went to the Plainfield Greyhound Park, a dog track located in Plainfield, Connecticut. (Tr. 73).^{*} Mr. Kubesh, together with three friends, purchased a trifecta ticket for the third race which won and paid \$1,261.80. (Tr. 73, 74). Mr. Kubesh went to the cashier's window where he was asked for identification by the cashier. At that time he was approached by another individual who offered to buy Mr. Kubesh's winning ticket. (Tr. 75). Mr. Kubesh agreed to sell the winning ticket and was then taken to a second individual who paid Mr. Kubesh approximately one hundred dollars less than the face value of his winning ticket. (Tr. 75). Mr. Kubesh gave neither of the two individuals involved in purchasing his ticket his name, social security number, nor any information about himself, nor was he contacted by either individual subsequent to April 5, 1976. (Tr. 77, 78). Mr. Kubesh was

^{*} References marked ("Tr.") refer to the transcript of proceedings in the trial court.

not able to identify either of the two individuals involved in purchasing his winning ticket. (Tr. 81).

Raymond Weber, a special agent with the Intelligence Division of the Internal Revenue Service, was on surveillance at the Plainfield track during the evening of April 5, 1976. (Tr. 84). Subsequent to the third race, Special Agent Weber saw Mr. Kubesh at the trifecta window and observed Mr. Kubesh walk away from the cashier's window and meet with the defendant, Louis Dimaio. (Tr. 86). Special Agent Weber observed the defendant take money from his pocket, count the money twice in front of Mr. Kubesh, then hand the money to Mr. Kubesh, who in turn handed the defendant a trifecta ticket. (Tr. 86). Thereafter, Special Agent Weber kept the defendant under surveillance and subsequent to the fourth race saw the defendant meet with Collins, the co-defendant in this case.¹ Special Agent Weber saw the defendant Dimaio hand Collins the winning ticket. (Tr. 92). Collins then went to the cashier's window, produced identification, signed the Form 1099, returned to the defendant and gave the defendant the money from the winning ticket. (Tr. 92). The defendant then counted the money and gave Collins two of the bills. (Tr. 92; 124-128).

The co-defendant in this case, Donald M. Collins, had presented to the cashier identification in the name of "Edward Smith, Cutler Street, Flint, Michigan" when cashing the ticket. (Tr. 52-54). In fact, the same cashier had cashed other winning tickets for an individual known

¹ Donald M. Collins was indicted as John Doe, also known as Edward S. Smith. Subsequent to the indictment, it was determined through F.B.I. fingerprint records, that the true identity of the John Doe involved in this case is Donald M. Collins. (Tr. 89, 90).

to the cashier as Ed Smith from Flint, Michigan. (Tr. 61-66). At trial, the Government called as a witness Edward J. Smith, a resident of Flint, Michigan, who testified that, prior to coming to Connecticut to testify, he had never been in the State of Connecticut. (Tr. 272). Mr. Smith testified that the fraudulent Form 1099 in question bore his name, address, Social Security number, and purported signature, but that he had not signed the Form 1099 and had never been to the dog track in Plainfield. (Tr. 272, 273). Mr. Smith stated that he had lost his wallet in 1974 and that he did not give anyone permission to use his identification nor to sign the Form 1099. (Tr. 274, 275).

Special Agent John J. Dahill, Intelligence Division, Internal Revenue Service, also was on duty at the Plainfield Greyhound Park on the evening of April 5, 1976. (Tr. 200). Subsequent to the running of the third race, Special Agent Dahill observed the defendant meet with Donald M. Collins and hand Collins a trifecta ticket. (Tr. 201). Special Agent Dahill followed Collins to the cashier's window, and observed Collins produce identification and cash the winning ticket. (Tr. 202). Special Agent Dahill then waited until Collins had left the window area and then approached the cashier, identified himself, and asked to see the Form 1099 which Collins had signed. (Tr. 202). Special Agent Dahill initialed the back of the Form 1099 which Collins had signed using Smith's identification. (Tr. 210, 211). The Form 1099 which co-defendant Collins had fraudulently signed and which was immediately thereafter initialed by Special Agent Dahill was Government's Exhibit No. 1 at trial. (Tr. 210, 211).

Special Agent William Smith, Intelligence Division, Internal Revenue Service, was on duty at the Plainfield Greyhound Park on April 5, 1976 and also observed Collins go to the trifecta cashier's window. (Tr. 160).

Special Agent Smith observed Collins return to the table at which the defendant was seated and hand the defendant money. (Tr. 159, 160). Special Agent Smith also saw the defendant count the money and then give two bills to Collins. (Tr. 160).

On April 5, 1976 the Plainfield Greyhound Park had definite procedures and guidelines as to when and how a Form 1099 was to be prepared. (Tr. 27). On any bet where the payoff was at 300 to 1 odds or better, the track required the completion of a Form 1099. (Tr. 27, 28). The person presenting a winning ticket was required to produce identification, including a driver's license and Social Security card. (Tr. 28). The cashier would then fill out a Form 1099 in triplicate from the identification and the Form 1099 would be given to the winner for signature. After the form was signed, the person who had presented the winning ticket would be given one copy of the Form 1099. (Tr. 28, 29). That the defendant Dimaio was aware of the track's procedures requiring the completion of a Form 1099 is evidenced by the fact that the defendant had experienced the above procedure and signed his own name to six Forms 1099 prior to April 5, 1976 and three Forms 1099 subsequent to that date. At trial, the defendant introduced into evidence copies of the Forms 1099 which he had completed in his own name. (Tr. 56, 147, 295).

Ronald Brochu, a resident of Fall River, Massachusetts, testified that he had signed twelve Forms 1099 at the Plainfield Greyhound Park between March 27 and April 12, 1976. (Tr. 276-278; 284). Mr. Brochu testified that he had received all the winning tickets for which he signed Forms 1099 from a man named "Arthur" or from the defendant, Louis Dimaio. (Tr. 279, 280). Mr. Brochu stated that on each occasion he presented identification to the cashier, signed the Form 1099 in his

own name, and was paid by the cashier. (Tr. 277, 280). Mr. Brochu then gave the money which he had received from the cashier to the defendant. (Tr. 280). "Arthur" would later pay Mr. Brochu a fee ranging from twenty to seventy-five dollars for cashing the ticket. "Arthur" received the money for Brochu's fee from the defendant. (Tr. 281). When on one occasion Mr. Brochu did not want to cash a winning ticket for the defendant, the defendant told Brochu, "[N]o funny business." (Tr. 282). Mr. Brochu stated that on April 5, 1976 he cashed three winning tickets for the defendant and on that occasion he was paid directly by the defendant because the defendant did not want "Arthur" to get a cut. (Tr. 283, 284). Mr. Brochu stated that he remembered the April 5, 1976 transactions because on that date the defendant had threatened him. (Tr. 306).

All Forms 1099 which were introduced into evidence had been filled out by the cashiers and signed by the person presenting the winning ticket in accordance with track policy. After a winning ticket requiring a Form 1099 had been cashed, the track's copies of the Form 1099 would be taken to the ticket room where it would be compared with the actual ticket. (Tr. 30). The track instituted this policy in order to ensure that they had a Form 1099 "for every ticket over the tax limit". (Tr. 30). Of course, the track was required to file Forms 1099 in these instances under Title 26, United States Code, Section 6041(a). The Forms 1099 were ultimately turned over to the Internal Revenue Service. (Tr. 31).

Special Agent Dahill testified that he had picked up the Form 1099 which was the subject of Count One of the indictment on the night it was prepared, April 5, 1976. (Tr. 210, 211). The forms which Mr. Brochu had signed (Government's Exhibit No. 4 at trial) were picked up by Special Agent Dahill on June 4, 1976. (Tr. 211, 212). Special Agent Dahill, acting as a representa-

tive of the District Director, Internal Revenue Service, took custody of these Forms 1099, thereby relieving the track of its responsibility under law to file them. (Tr. 219, 220). Special Agent Dahill told track officials that the forms were filed as of the date he picked them up, and, in fact, Dahill was to personally deliver these forms, as well as others from other parimutuel facilities in Connecticut, to the Andover (Massachusetts) Service Center. (Tr. 218, 219).

ARGUMENT

I.

The Government Presented Ample Evidence From Which A Reasonable Mind Might Fairly Conclude Guilt Beyond A Reasonable Doubt.

In the present case, as in any criminal case, constitutional due process required the Government to prove beyond a reasonable doubt every fact necessary to constitute the crime charged. *In re Winship*, 397 U.S. 358, 364 (1970). The defendant here contends that the Government failed to meet its burden of proof in that the evidence was insufficient to sustain defendant's convictions of violations of Title 26, United States Code, Section 7206(2) and Title 18, United States Code, Section 371; namely, aiding and abetting the submission of a false document to the Internal Revenue Service and conspiracy.

Generally, when a defendant appeals a conviction, the evidence must be viewed in the light most favorable to the Government. *Glasser v. United States*, 315 U.S. 60, 80 (1942); *United States v. Marrapese*, 486 F.2d 918, 921 (2d Cir. 1973), *cert. denied*, 415 U.S. 994 (1974).

Where a defendant has moved for a judgment of acquittal, the trial court must determine whether, upon the evidence, a reasonable mind might fairly conclude guilt beyond a reasonable doubt. *United States v. Taylor*, 464 F.2d 240, 243 (2d Cir. 1972); *United States v. Figueroa-Paz*, 468 F.2d 1055, 1058 (9th Cir. 1972). Even where the Government's case is entirely circumstantial, the evidence does not have to be such as to exclude every reasonable hypothesis other than that of guilt, and the evidence must be viewed in light of the totality of the Government's case since one fact may gain color from others. *United States v. Tramunti*, 500 F.2d 1334, 1338 (2d Cir.), *cert. denied*, 419 U.S. 1079 (1974); *United States v. Hawley*, Docket No. 76-1469 (2d Cir. April 27, 1977), Slip. Op. 3239 at 3243.

In the present case, the Government presented ample evidence from which a reasonable mind might fairly conclude guilt beyond a reasonable doubt on both counts charged in the indictment. The evidence showed that the true winner on a trifecta ticket for the third race on April 5, 1977 sold his winning ticket to the defendant, Louis Dimaio, for about ten percent less than face value. (Tr. 75, 86). The defendant then transferred the winning ticket to his co-defendant, Donald M. Collins. (Tr. 92). Collins went to the cashier's window, signed a Form 1099 (using the name Edward Smith and fraudulent identification), returned to the defendant and handed the defendant the money he had received. (Tr. 92, 202). The defendant then counted the money and handed Collins two of the bills for his services. (Tr. 92; 124-128; 160). As special agent of the Internal Revenue Service had observed Collins cash the winning ticket and immediately thereafter initialed the back of the Form 1099 which Collins had falsified. (Tr. 202, 210-211).

The defendant himself introduced into evidence six Forms 1099 which he had signed in his own name prior

to April 5, 1976 and three Forms 1099 subsequent to that date which conclusively established his knowledge of track procedures and his knowledge and intent as to his conduct on the evening of April 5, 1976. (Tr. 56, 147, 295). The Government suggests that the trial court properly considered this evidence in denying the defendant's motion for judgment of acquittal since the defendant waived any objection to the sufficiency of the Government's case alone by introducing evidence on his own behalf. *McGautha v. California*, 402 U.S. 183, 215-216 (1971); *United States v. Rosengarten*, 357 F.2d 263, 266 (2d Cir. 1966). Thus, this Court should now consider all the evidence, including the defendant's evidence which strengthened the Government's case. *United States v. Haskell*, 327 F.2d 281, 282 n. 2 (2d Cir. 1964).

The Government also introduced evidence which showed that the defendant had paid a third individual to sign twelve Forms 1099 for winning tickets between March 27 and April 12, 1976. (Tr. 276-284). These other incidents were introduced as prior and subsequent similar acts to show knowledge, intent, a common plan or scheme, and the absence of mistake on the part of the defendant, and were clearly admissible for these purposes.² (See Argument III, *infra*).

The defendant argues that, under *United States v. Pomponio*, 429 U.S. 10 (1976), the defendant could not have wilfully violated the law since he had no "known legal duty" to the track or to the Internal Revenue Service. The defendant obviously misconstrues the holding of

² These transactions were the subject of another indictment, *United States v. Louis Dimaio and Arthur Almeida*, Criminal No. N-76-99 (D. Conn. 1976). Almeida pled guilty and was sentenced. This indictment was dismissed as to the defendant Dimaio subsequent to his conviction in the present case.

that case. In *Pomponio, supra*, the United States Supreme Court held that the Court of Appeals for the Fourth Circuit had incorrectly assumed that the evil motive necessary for wilfulness "meant something more than the specific intent to violate the law described in the trial judge's instruction". *Id.* at 11. In *Pomponio, supra*, the defendants were charged with filing false income tax returns in violation of Title 26, United States Code, Section 7206(1). In that case, the defendants had a legal duty to file income tax returns. In the present case, the defendant was charged with aiding and abetting the preparation of a false and fraudulent form 1099 in violation of Title 26, United States Code, Section 7206(2). Here it was the Plainfield Greyhound Park which had the duty to file the Form 1099 under Title 26, United States Code, Section 6041(a).

The defendant's argument that the defendant "owed no legal duty of reporting to the track, or to the IRS, unless the payor-track made a 'demand' on him for information", (Appellant's Brief, p. 13), is patently frivolous. Elaborate steps were taken, including the use of fraudulent identification by Collins when cashing the winning ticket for the defendants, to ensure that no one would ever know the identity of the true winner. Evidently the defendant believes that it was the track's obligation to demand of Collins the identity of the true winner of the ticket which Collins was cashing for a fee with fraudulent identification in the name of "Smith", having received the ticket from the defendant Dimaio which in turn Dimaio had purchased for ten percent less than its face value from the true winner whose identity was unknown to Dimaio. There was no obligation on the track to make any demand upon the person presenting the winning ticket and signing the Form 1099. The United States Court of Appeals for the First Circuit has rejected this argument, stating, "The teller was under no obligation to ask for the name and address of the actual

recipient of the income. It was reasonable for him to assume that, unless notified otherwise, the person presenting the ticket would be the actual recipient of the income." *United States v. Dumaine*, 493 F.2d 1257, 1259 (1st Cir. 1974).

Defendant's argument that the Government presented insufficient evidence of wilfulness in this case is not supported by the record. The evidence of defendant's wilfulness was overwhelming. The law is clear that the purpose of Title 26, United States Code, Section 7206(2) is to help the Government locate and check upon recipients of income, and the amounts of income received. *United States v. Carroll*, 345 U.S. 457 (1953); *United States v. Haimowitz*, 404 F.2d 38 (2d Cir. 1968). Indeed, recently a defendant was convicted under this statute where the defendant had backdated purchase contracts knowing that the false information would be used in the preparation of income tax returns. *United States v. Crum*, 529 F.2d 1380 (9th Cir. 1976). That the defendant had knowingly and wilfully attempted to defeat the purpose of the statute is amply demonstrated by the facts discussed *supra*.

The defendant also argues that the "District Court mistakenly assumed that the Form 1099 in question was necessarily false and fraudulent, as a matter of law, unless it reflected the name or names of the original 'winner' or winners on this ticket". (Defendant's Brief, p. 18 *et seq.*). The District Court made no such assumption. Whether or not the Form 1099 was false and fraudulent as to a material matter was a question of fact for the jury which the jury resolved against the defendant by its verdict of guilty.

In factual situations similar to that in the present case, this Court has consistently affirmed the convictions of defendants who attempted to mislead and defraud the

Government. See *United States v. Haimowitz*, *supra*; *United States v. Green*, 421 F.2d 1237 (2d Cir. 1970); *United States v. Kessler*, 449 F.2d 1315 (2d Cir. 1971); *United States v. Maistrow*, 451 F.2d 1342 (2d Cir. 1971).

The defendant also argues that the use of a "home-made Form 1099" by the Plainfield Greyhound Park when lawfully reporting its payment of income to others somehow prejudiced the defendant. The record amply demonstrates that all who dealt with the Forms 1099 prepared by the Plainfield Greyhound Park treated the forms as official forms. Moreover, the forms are nearly identical except that the Plainfield Greyhound Park added some information to their forms for their own purposes. (Appellant's Appendix, p. A-114). Addressing the same issue, the Court of Appeals for the Fifth Circuit stated:

"While it is true that the Forms 1099 used at the racetrack were not official Internal Revenue Service forms and that the indictment apparently referred to official forms, the track forms were identical to the official forms except for the addition of a few blanks. All who dealt with the track forms, including the Internal Revenue Service, treated them as official ones. Under these circumstances we do not regard the proof of falsification of non-official forms, rather than falsification of official ones, as materially at variance with the allegation."

United States v. Lincoln, 472 F.2d 1183, 1184 (5th Cir. 1973).

The defendant distinguishes the *Lincoln* case by stating: "In the instant case defendant is not arguing about some variance between pleadings and proof. He is arguing that there was no 'falsification' of any form, official or non-official, attributable to him, the defendant DiMaio." (Defendant's Brief, p. 23). While the mean-

ing of these closing sentences is ambiguous in light of his argument about "home-made" forms, again the defendant is arguing a question of fact resolved against him by the jury. The evidence of the defendant's participation in the scheme was overwhelming.

The Form 1099 utilized by the Plainfield Greyhound Park is entitled at the top in heavy dark print "U.S. Information Return For Calendar Year 19—"; and to the left at the top: "Form 1099, U.S. Treasury Department, Internal Revenue Service". (Defendant's Appendix, A-114). The defendant himself had filled out these forms six times prior to April 5, 1976. Instead of asking for the name of the "recipient", the form reads "To Whom Paid". The defendant claims that the phrase "To Whom Paid" was misleading in that the form permitted the insertion of only a single name. In a very recent case, a race track in Colorado utilized a Form 1099 very similar, if not identical, to that involved in the present case. In affirming the conviction of another "ten-percenter" who had cashed winning tickets for the true winners, the Court of Appeals for the Tenth Circuit described the actions of the ten-percenter as follows:

"In each instance the Kennel Club cashier filled out an Internal Revenue Service Information Form 1099 based on information given him by Snyder. Under the heading 'To Whom Paid' the cashier printed the name 'Irving Snyder', along with Snyder's home address, driver's license number, and his Social Security number. The cashier then noted the amount paid and affixed his own signature thereon. Irving Snyder, in turn, signed his name on the form as being the 'signature of payee'."

United States v. Snyder, 549 F.2d 171, 172 (10th Cir. 1977).

The defendant argues that one is not properly the subject of a violation of Section 7206(2) unless and until a "winner verification" form is signed at the track and the track relies on the winner verification form to complete its Form 1099. The law is clearly to the contrary. See, for example, *United States v. Snyder, supra*; *United States v. Lincoln, supra*; *United States v. Dumaine, supra*; *United States v. Rizzo*, 313 F. Supp. 734 (D. Del. 1970), appeal dismissed, 439 F.2d 694 (3d Cir. 1971).

Indeed, defendants have been convicted of conspiracy to violate Title 26, United States Code, Section 7206(2) where the tickets were never cashed and consequently no false information furnished to the Internal Revenue Service. *United States v. Walsh*, 544 F.2d 156 (4th Cir. 1976).

In the present case, the Government presented ample evidence upon which a reasonable mind might fairly conclude guilt beyond a reasonable doubt. The Government presented overwhelming evidence of the defendant's culpability on both counts of the indictment, and the trial court properly denied defendant's motion for judgment of acquittal.

II.

The Government Did Not Violate The Principle Of Law Which Has Emerged From *Brady* And Its Progeny.

The defendant argues that the Government failed to comply with its obligations under *Brady v. Maryland*, 373 U.S. 83 (1963) and its progeny, and under Rule 4(a)(8) which provides that the Government attorney must turn over to defense counsel "all evidence which may be favorable to the accused on the issue of guilt or

innocence within the scope of *Brady v. Maryland*, 373 U.S. 83 (1963)." The record is absolutely barren of any indication of a *Brady* violation by the Government.

Since the claim of a *Brady* violation was never raised in the trial court, there was no hearing on this claim in the trial court, nor are there any affidavits from either side on file. However, the Assistant United States Attorney who tried the present case also tried (to the Court) the case of *United States v. Joseph O. Schettini and Anthony J. Caruolo*, Criminal No. N-76-96 (D. Conn. 1977). At no time did the prosecutor who tried both the present case and the *Schettini* case know of any change in the policy of cashing tickets at the Plainfield Greyhound Park until the change was brought out by defense counsel during the *Schettini* trial on February 3, 1977. It should be pointed out that defense counsel in the *Schettini* trial was the same individual who tried the present case and is representing the defendant in this appeal.

The first mention of any change in procedure at the track came during cross-examination by Attorney McGowan of a track cashier during the *Schettini* trial on February 3, 1977. The following is a portion of the cross-examination by Attorney McGowan:

"Q. Some time after April 14th, '76, was there a change made in the procedure that you followed as cashier down there?

"Mr. Hartmere: Objection, your Honor. It's irrelevant.

"The Court: Well, I'll take the evidence. If I later determine it is irrelevant, I won't consider it. If I determine it is relevant, you'll find it in my findings of fact.

"Q. Do you understand the question—

"A. Yes, I do.

"Q. —Mr. Parker? Okay, would you answer?

"A. I think it was June or July they instituted a new system where you have to go to verification window with any ticket and fill out a verification form."

(*United States v. Schettini, et al.*, Criminal No. N-76-96, D. Conn. 1977, Transcript of Proceeding of February 3, 1977, p. 9).

The verification form which appears on page 10 of defendant's brief in the present case was *Defendant's Exhibit A* in the *Schettini* case.

It should be noted that in the present case the defendant was found guilty on both counts on January 19, 1977. Defense counsel was obviously aware of a change in track policy to the use of a verification slip at least by February 3, 1977 (approximately two weeks later) although the Assistant United States Attorney who tried both cases learned of the change from defense counsel at the second trial. The defendant in the present case was sentenced on February 22, 1977, almost three weeks after defense counsel had introduced into evidence the verification slip. The defendant here contends that the Government violated the *Brady* principle by failing to inform the defense of the change in the track's policy to the use of a verification slip "pregnant as it was with an inference supporting DiMaio's lack of 'wilfulness' on the evening of April 5, 1976." (Defendant's Brief, p. 32). Interestingly enough, the *Brady* claim was not "pregnant" enough to use as the basis of a motion for judgment of acquittal or a motion for a new trial prior to sentencing in this case. Moreover, the defendant thought it so "pregnant" with an inference of lack of wilfulness that he never mentioned it to the trial judge in his sentencing remarks, although he had known about it for at least three weeks. (Tr. 381-384).

While the Assistant United States Attorney first learned of changes in the track's policy from defense counsel, the record in this case clearly demonstrates that the defendant knew of changes in policy even during the trial of the present case. During the cross-examination of a witness by Attorney McGowan, the following transpired:

"Q. Now, at some later time after April 5, 1976, you had a change in your policy there, didn't you?

"A. Yes, we did.

"Q. After April 5, 1976, which is the only date in the indictment in this case, you put up signs, didn't you?

"A. I don't follow you after April 5th.

"Q. After April 5, 1976, sometime after April 5th, can you tell when you made this change in your policy?

"Mr. Hartmere: I'm going to object to this on relevancy.

"The Court: Your very point was, we are only concerning with April 5th.

"Mr. McGowan: Yes, your Honor. That's true. All right, I withdraw the question." (Tr. 45).

While the foregoing does not show that Attorney McGowan knew of the change in policy concerning verification slips at the time of trial of the present case, it does show that, at the very least, the defendant was aware of *some* changes in policy after April 5, 1976 and that the defendant believed that changes in policy after April 5, 1976 were irrelevant to the trial of the present case. Throughout the trial of this case, the defendant objected to any testimonial or physical evidence which did not pertain to April 5, 1976. Just prior to the above-quoted portion of the trial transcript, defense counsel objected to a question concerning track policy on payment

on winning trifecta tickets. At that time, defense counsel stated the following:

"Mr. McGowan: The objection carries a meaning, Do they now have it? We are not concerned with what they have now. We are concerned what the situation was on one day, April 5, 1976? And besides, I don't quite see what relevance the policy of the track might have with respect to an alleged federal criminal act." (Tr. 26).

The Government suggests that the defendant was correct in asserting that any change in track policy after April 5, 1976 is irrelevant to the defendant's trial for federal violations which occurred on April 5, 1976. Even had the Government known of the change of policy to verification slips sometime after July, 1976, and turned the information over to the defendant, this change in policy would have been irrelevant to the case on trial and therefore inadmissible. That this change in policy was not favorable to the defendant on the issue of punishment is evidenced by the fact that defense counsel knew of the policy change three weeks prior to disposition and never mentioned the same to the trial court at disposition.

Contrary to defendant's assertion that no reasonable person could read the new verification form "without concluding that the Internal Revenue Service was, directly or indirectly, largely responsible for this new form", such is not the case. At the *Schettini* trial, there was testimony from representatives of Plainfield Greyhound Park that the verification form was utilized after a suggestion from the Connecticut State Commission On Special Revenue, a decision in which the Internal Revenue Service took no part. (*Schettini* transcript, pp. 11; 27-28).

While making this *Brady* argument, the defendant concedes that there was no "bad faith or negligence or delinquency" on the part of the prosecutor or on the part of the special agents of the Internal Revenue Service.

(Defendant's Brief, p. 33). However, even where there is no evidence of bad faith on the part of the Government, the suppression of evidence favorable to the accused upon request may violate due process "where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Brady v. Maryland*, *supra* at 87. The term "materiality" as used in *Brady* clearly describes evidence of greater value than that which is merely "favorable to the accused." *Giglio v. United States*, 405 U.S. 150, 154 (1972).

Where there has been no wilful nondisclosure of evidence, this Court has formulated a standard of materiality which requires that there be "a significant chance that this added item, developed by skilled counsel as it would have been, could have induced a reasonable doubt in the minds of enough jurors to avoid a conviction." *United States v. Miller*, 411 F.2d 825, 832 (2d Cir. 1969); *United States v. Mayersohn*, 452 F.2d 521, 526 (2d Cir. 1971); *United States v. Kahn*, 472 F.2d 272, 287-289 (2d Cir.), *cert. denied*, 411 U.S. 982 (1973); *United States v. Pfingst*, 490 F.2d 262, 277 (2d Cir.), *cert. denied*, 417 U.S. 919 (1973); *United States v. Rosner*, 516 F.2d 269, 273 (2d Cir. 1975).

In this present case, the defendant's *Brady* claim is based on a document that the Government never had in its possession. The defendant at trial admitted that any change in the policy of the racetrack was immaterial to the case being tried. The document in question was equally accessible to the defendant and, in fact, the same defense counsel had possession of a verification slip two weeks after this trial. The defendant did not make any claim of a *Brady* violation nor a motion for a new trial based on newly discovered evidence to the trial court. The defendant never mentioned the document nor the change in track policy although it was known to him for three weeks prior to sentencing in the present case.

The Government strongly contends that under Local Rule 4(a) the Government must disclose items "in the possession, custody or control of the Government, the existence of which is known or by the exercise of due diligence may become known to the attorney for the government." The verification slip and change in policy were obviously not material to the preparation of the defense, nor even admissible at trial. The existence of the verification slip was simply not known to the Government attorney, nor should the Government be required to investigate irrelevant matters for the defense. The defendant's claim of a *Brady* violation is, therefore, unfounded on the facts and in the law.

POINT III

Evidence Of Prior And Subsequent Similar Acts Was Properly Admitted Into Evidence.

Defendant contends that the trial court committed reversible error by allowing the Government to present evidence that the defendant had engaged in both prior and subsequent similar acts. Again, the defendant's contention is unfounded both in the law and on the facts. The trial court exercised sound discretion in weighing the probative value of the evidence against potential prejudice and properly admitted the evidence.

This Court has a long history of holding evidence of similar acts admissible if such evidence is relevant for a purpose other than solely to prove a defendant's criminal character. *United States v. Seeman*, 115 F.2d 371, 373 (2d Cir. 1940). Indeed, this Court has consistently held that evidence of relevant similar acts, including other crimes, is "admissible for all purposes except to show defendant's criminal character or disposition." *United States v. Santiago*, 528 F.2d 1130, 1134 (2d Cir.), cert.

denied, 425 U.S. 972 (1976); *United States v. Brettholz*, 485 F.2d 483, 487 (2d Cir. 1973), *cert. denied*, 415 U.S. 976 (1974); *United States v. Deaton*, 381 F.2d 114, 117 (2d Cir. 1967).

The defendant complains that the testimony of the witness concerning prior and subsequent similar acts was inadmissible since the witness' name did not appear on the Government's list of witnesses previously supplied to the defendant pursuant to the trial court's order. (Defendant's Appendix, A-7 to A-10). The defendant had been provided with a list of witnesses in this case on September 13, 1976, as well as lists of witnesses for two companion indictments. (Defendant's Appendix, A-9 to A-12). The name of the witness who testified as to the similar acts (Ronald Brochu) appeared on the list of witnesses for one of these companion indictments (Criminal No. N-76-99). The same defense counsel, Amedeo C. Merolla, represented the defendant on all three indictments.

Attorney Merolla had been told that the Government would offer Mr. Brochu's testimony as evidence of prior and subsequent similar acts on the Wednesday prior to trial, January 12, 1977. The defense attorney who actually tried the case was specifically informed that Brochu would be a witness on Friday, January 14, 1977, one day before he had even agreed to enter the case. (Defendant's Appendix, A-14 to A-22). Concerning the introduction of F.B.I. fingerprint evidence to prove the true identity of co-defendant Collins (which ultimately was unnecessary at trial), the following colloquy took place:

"Mr. McGowan: . . . I wasn't really avidly interested in what Mr. Hartmere was telling me on Friday.

"The Court: You weren't?

"Mr. McGowan: I had never met the defendant on Friday.

"Mr. Hartmere: Mr. Merolla was told that definitely on Wednesday when I talked to him. I told Mr. McGowan that on Friday. I don't know how interested he was, but I assumed he was interested. He said he was going to represent the defendant." (Tr. 17).

Defense counsel was provided with all Jencks Act material concerning Brochu on the evening before Brochu was scheduled to testify. On the evening before Brochu testified, defense counsel was specifically asked whether he wished a continuance for more time in order to further prepare his case. Defense counsel stated that he did not want a continuance. (Defendant's Appendix, A-60 to A-63). On the following morning, defense counsel indicated that he was ready to proceed. (Tr. 197).

Clearly there was no prejudice to the defendant from the fact that Mr. Brochu's name did not appear on the witness list for this particular indictment although Brochu was on the witness list for a companion indictment. *United States v. Cannone*, 528 F.2d 296 (2d Cir. 1976) is not to the contrary. Here, the defendant knew of the witness Brochu months before this trial and defense counsel had been informed of the Government's intention to call Brochu as a witness prior to trial. Moreover, the defendant was specifically asked by the Court whether he wished a continuance to prepare for Brochu's testimony in order to alleviate any possible prejudice, and the defendant emphatically stated that he did not want a continuance. The defendant did not and could not demonstrate any prejudice to him arising from the fact that the witness' name did not appear on the witness list for this case. *United States v. Floyd, et al.*, Docket Nos. 76-1462, 76-1463 (2d Cir., Slip Op. May 16,

1977). Certainly, there is no authority for the proposition that the Government cannot amend its witness list prior to trial.

Brochu's testimony concerning his cashing winning tickets and filling out Forms 1099 for the defendant, delivering the money to the defendant, and being paid for these services during the two week period just prior and subsequent to April 5, 1976 clearly showed both prior and subsequent similar acts by the defendant. Prior similar acts have been held admissible to show knowledge and intent. *United States v. Leonard*, 524 F.2d 1076, 1091 (2d Cir. 1975); *United States v. Drummond*, 511 F.2d 1049, 1055 (2d Cir.), *cert. denied*, 423 U.S. 844 (1975). Subsequent similar acts have been held admissible to prove the same factors. *United States v. Super*, 492 F.2d 319 (2d Cir.), *cert. denied*, 419 U.S. 876 (1974); *United States v. Cavallaro, et al.*, Docket Nos. 76-1437, 76-1481 (2d Cir., Slip Op. April 19, 1977). Evidence of similar acts is admissible where the other acts are logically connected with that charged or the acts are so closely and inextricably a part of the guilty act itself as to form a part of the plan, system or pattern of criminal action. *United States v. Campanile*, 516 F.2d 288, 292 (2d Cir. 1975). This was obviously the case here. See *United States v. Kessler*, *supra* at 1317.

When the Government first proposed introducing evidence of similar acts to "prove intent, plan, knowledge, or absence of mistake or accident", the trial court "with some reluctance" sustained the defendant's objection. (Defendant's Appendix, A-14, A-15, A-23, A-24). However, subsequent to the defendant's cross-examination of the Government's witnesses, the trial court reconsidered its decision and allowed the Government to present evidence of similar acts. The defendant had extensively cross-examined all Government witnesses as to their opportunity to observe the events in question, the identifica-

tion of defendants, and conversations between the co-defendants. The trial court correctly held that because of the nature of the defense, this evidence was admissible during the Government's case on direct. *United States v. Johnson*, 382 F.2d 280, 281 (2d Cir. 1967); *United States v. Deaton*, *supra* at 118 n.3; *United States v. Cohen*, 489 F.2d 945, 950 (2d Cir. 1973). In the present case, the transactions of the defendant with Ronald Brochu were "of great probative value in showing intent in a pattern or scheme of systematically planned and practically identical criminal acts." *United States v. Johnson*, *supra* at 281.

Defendant contends that the trial court committed a "glaring error" in holding that probative value outweighed prejudice since the conduct was not outrageous nor of an "inflammatory nature." The defendant states that "there is no authority for any such judicial test." (Defendant's Brief, p. 45). Contrary to defendant's suggestion, however, this is exactly what the trial court should have considered. *United States v. Kaufman*, 453 F.2d 306, 311 (2d Cir. 1971); *United States v. Williams*, 470 F.2d 915, 917-918 (2d Cir. 1972); *United States v. Leonard*, *supra* at 1091. Cf. *United States v. Provoo*, 215 F.2d 531, 537 (2d Cir. 1954).

The rule which the trial court here was called upon to apply is that evidence of another crime is admissible unless the likelihood of prejudice outweighs its probative value. *United States v. Deaton*, *supra* at 117; Rule 404(b), Federal Rules of Evidence. The trial court did, in fact, balance prejudice against probative value and properly admitted the evidence concerning similar acts.

POINT IV

The Trial Court Properly Instructed The Jury As To The Law To Be Applied In This Case.

Defendant contends that the trial court committed reversible error in failing to give some of defendant's requested instructions. The Government submits that Judge Newman's charge, when viewed *in toto*, was complete and entirely proper.

Contrary to defendant's suggestion, Judge Newman did not refuse to charge the jury on "wilfulness." (Defendant's Brief, p. 35). Judge Newman charged the jury thoroughly on wilfulness. (Defendant's Appendix, A-96, A-97). Judge Newman did give defendant's Request No. 19 (wilfulness as an essential element) and explained the meaning of wilfulness correctly and completely, although not in the language requested by the defendant. In this regard, there is no requirement that a court charge a jury in the language requested by a defendant. *United States v. Rosa*, 493 F.2d 1191, 1195 (2d Cir.), *cert. denied*, 419 U.S. 850 (1974); *United States v. Sacco*, 436 F.2d 780, 783 (2d Cir.), *cert. denied*, 404 U.S. 834 (1971); *United States v. Jackson*, 390 F.2d 317, 319 (2d Cir.), *cert. denied*, 392 U.S. 935 (1968).

Judge Newman charged the jury on wilfulness as follows:

"An act is done willfully if done voluntarily and intentionally and with the specific intent to do something the law forbids: that is, with a bad purpose either to disobey or disregard the law. It is not sufficient that a person may have acted with negligence or even gross negligence. He must know and intend to do something the law forbids." (Defendant's Appendix, A-96, A-97).

This was a complete and exact statement of the law. *United States v. Pomponio*, *supra* at 11; *United States v. Bishop*, 412 U.S. 346 (1973). See also Devitt and Blackmar, *Federal Jury Practice and Instructions*, West Publishing Co., 1977, Section 14.06.

Judge Newman was not required to charge the jury concerning a "legal duty" when he defined wilfulness for the jury. *United States v. Pomponio*, *supra*, on which defendant places heavy reliance, is not to the contrary. There, the United States Supreme Court used the phrase "intentional violation of a known legal duty" in explaining what is meant by "bad purpose" in terms of defining wilfulness. In the present case, Judge Newman told the jury that in order to have acted wilfully the defendant must have acted "with a bad purpose either to disobey or disregard the law." (Defendant's Appendix, A-97). Unlike some other tax statutes, Title 26, United States Code, Section 7206(2) places no affirmative legal duty on an individual other than to refrain from attempting to mislead the Internal Revenue Service in its duty of collecting revenue.

Judge Newman was not obliged to charge the jury concerning whether or not the Form 1099 in question was an "officially authorized form." Under Title 26, United States Code, Section 6041(a), it was the duty of the Plainfield Greyhound Park to report payments in excess of \$600.00 to the Internal Revenue Service. Ali who dealt with the Forms 1099 submitted, including representatives of the Internal Revenue Service, treated the forms as official. Whether or not the Form 1099 was official was simply not a question for the jury in view of the fact that the defendant was charged with a violation of Section 7206(2), but rather a question of law for the Court. (Defendant's Appendix, A-84). The law is clear that a defendant is properly convicted under Section 7206(2) even where the defendant has not

signed or prepared any official document, but merely fraudulent sales contracts. In this regard, the jury was specifically instructed that "the fact that the defendants did not sign the income tax returns in question is not material to your consideration." *United States v. Crum, supra* at 1382, 1383 n.4. The law of this Circuit is clear that defendants are properly convicted under Section 7206(2) where a fraudulent verification slip has been submitted to a race track. *United States v. Haimowitz, supra*; *United States v. Kessler, supra*. Moreover, a defendant may properly be convicted of conspiracy to violate Section 7206(2) where no document of any kind has been completed. *United States v. Walsh, supra*.

The question of a variance was simply not a question to be determined by the jury but rather a question of law for the Court which was properly decided against the defendant. (Defendant's Appendix, A-86). In any event, Judge Newman, in his charge, did inform the jury that they could consider the evidence that the Form 1099 was "not an official form." (Defendant's Appendix, A-93).

Defendant's Request to Charge No. 23 alleging that there was no requirement to name the true winner on a Form 1099 unless the winner "actually cashed such ticket" is simply a misstatement of the law. See Argument I, *supra*. Indeed, this Court has characterized this argument as "frivolous". *United States v. Maistrow, supra*. Again, this request was properly denied by the trial court since a trial court may properly deny requested instructions where the instructions are inaccurate or incomplete in any manner. *United States v. Leonard, supra* at 1084; *United States v. Kelly*, 349 F.2d 720 (2d Cir. 1965), *cert. denied*, 384 U.S. 947 (1966).

Judge Newman's instructions to the jury, when viewed *in toto*, were entirely fair, complete and proper. Judge

Newman correctly declined to instruct the jury on matters not within their province and on matters representing misstatements of law.

CONCLUSION

For all of the foregoing reasons, the Government respectfully urges that the defendant's conviction should be affirmed.

Respectfully submitted,

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United States Court of Appeals
FOR THE SECOND CIRCUIT

No. 77-1133

UNITED STATES OF AMERICA

Appellee

v.

LOUIS DIMAIO

Appellant

AFFIDAVIT OF SERVICE BY MAIL

Albert Sensale, being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 914 Brooklyn Ave
Brooklyn, New York

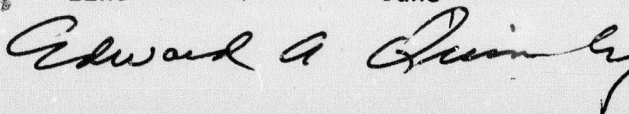
That on the 22nd day of June, 1977, deponent served the within Brief for the Appellee
upon James R. McGowan, Esq. ; Salter, McGowan, Arcaro & Swartz
300 Industrial Bank Building, Providence, Rhode Island 02903

Attorney(s) for the Appellant in the action, the address designated by said attorney(s) for the purpose by depositing a true copy of same enclosed in a postpaid properly addressed wrapper, in a post office official depository under the exclusive care and custody of the United States Post Office department within the State of New York.

Sworn to before me,



This 22nd day of June 1977



EDWARD A. QUIMBY
Notary Public, State of New York
No. 24-3183500
Qualified in Kings County
Commission Expires March 30, 1977